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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 979.

KEENER RUBBER, INC.,

Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY TO BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

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In its Brief in Opposition, the Board has committed the same basic error it committed when this case was before it: it has assumed that because Mowen told other employees not to use the 'phone, where to eat lunch, when to take rest breaks, etc., he did so *responsibly* and in the exercise of *independent judgment*.

This is a false assumption. It does *not* follow that just because Mowen gave certain instructions,[1] he did so responsibly and in the exercise of independent judgment. The questions involving responsibility and the exercise of independent judgment are separate and distinct issues. There must be substantial evidence that Mowen acted responsibly and exercised independent judgment before he can be classified as a supervisor under the Act.

[1] The Board also has continued to exaggerate the evidence as to the directions which Mowen gave. The actual evidence on this point is analyzed at pages 8 and 9 of our Petition.

The fact is that the Union offered no evidence whatsoever on these separate and distinct issues. The only evidence is the testimony of Miller, Bedford and Mowen, all of whom testified that Mowen was without responsibility and that he had no authority to direct other employees where it involved the use of independent judgment. He merely relayed instructions given by Miller and Bedford. This testimony was not contradicted or disputed in any way.

Can an employee be found to be a supervisor on the ground that he responsibly directs other employees and exercises independent judgment in doing so when there is no evidence that he has such responsibility—in fact, when the undisputed evidence is that he has no such responsibility? We submit he cannot be. To so find makes a farce out of the requirement of the Act that he must *responsibly* direct. It would deprive many thousands of employees of the protection afforded by the Act if they happen to relay instructions.

Thus, we respectfully urge this Honorable Court that the definition of the term "responsibly to direct" and the question of what evidence is sufficient to establish responsible direction, as well as what constitutes the exercise of independent judgment, are matters of extreme importance in the field of labor-management relations. These important questions of Federal law should be settled by this Honorable Court. To date they have not been.

The Board in its Opposition attempts to treat lightly our assertion that there is a conflict of decisions among the Courts of Appeals by saying that each case turns upon its particular facts. True, no two cases in the field of labor law or in any other field are exactly alike. The point is, however, that in analogous situations other Courts of Appeals have reached contrary decisions. Thus in fact there

is a conflict and the conflict is in an area where this Honorable Court has not spoken heretofore. This conflict can be resolved and this void in the areas in which this Honorable Court has spoken can be filled in only by the granting of the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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